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Roland Bazin

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FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER
LLP
901 NEW YORK AVENUE, NW
WASHINGTON, DC 20001-4413

EXAMINER

DIXON, ANNETTE FREDRICKA

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/725,048
Filing Date: November 29, 2000
Appellant(s): BAZIN ET AL.

Christopher T. Kent
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed June 8, 2009 appealing from the Office action mailed December 23, 2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is substantially correct. The rejections on claims 7, 8 and 11 have been withdrawn. As noted in section 6, claims 7 and 8 are objected to as being dependent upon a rejected base claim. Claim 11 is allowed.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

WITHDRAWN REJECTIONS

The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner.

Claims 4, 6, 7, 11, 25-48, 59, and 60-62 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement.

Claims 4, 6, 7, 11, 25-48, 59, and 60-62 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention.

Claims 4, 7, 8 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Number 6,533,971 to Stess et al.

Claims 4, 6, and 61-62 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh (5,343,536).

Claims 37, 46 and 47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh in view of Kvedar (Kvedar, J.C. et al. (1999). Teledermatology in a Capitated Delivery System Using Distributed Information Architecture: Design and Development. *Telemedicine Journal*, 5(4), 357-366.).

Claims 59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh in view of Kvedar and further in view of Murad (6,296,880).

Claim 48 is rejected under 35 U.S.C. 103(a) as being unpatentable over Groh in view of Sheng (6,801,343).

Claims 25-36 and 38-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh in view of Kvedar and further in view of Sheng (6,801,343).

ALLOWABLE SUBJECT MATTER

Thus, as a result of these withdrawn rejections, claims 7, 8, and 11 lack a rejection based upon the prior art. Therefore, Claims 7 and 8 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Claim 11 is allowed.

NEW GROUND(S) OF REJECTION

Claims 4, 6, and 61-62 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh (5,343,536) in view of Stoughton (3,969,516).

Claims 37, 46 and 47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh and Stoughton, and further in view of Kvedar (Kvedar, J.C. et al. (1999). *Teledermatology in a Capitated Delivery System Using Distributed Information Architecture: Design and Development. Telemedicine Journal*, 5(4), 357-366.).

Claims 59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh, Stoughton, and Kvedar, and further in view of Murad (6,296,880).

Claim 48 is rejected under 35 U.S.C. 103(a) as being unpatentable over Groh and Stoughton in view of Sheng (6,801,343).

Claims 25-36 and 38-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh, Stoughton, and Kvedar, and further in view of Sheng (6,801,343).

(7) Claims Appendix

A correct copy of appealed claims appears on pages 47-58 of the Appendix to the appellant's brief.

(8) Evidence Relied Upon

5,343,536	GROH	8-1994
6,801,343	SHENG	10-2004
6,296,880	MURAD	10-2001
3,969,516	STOUGHTON	7-1976

Kvedar, Dr. Joesph etal. "Teledermology in Capitated Delivery System Using Distributed Information Architecture: Design and Development." Telemedicine Journal. Volume 5, November 4, 1999. Pages 357-366.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

NEW GROUND(S) OF REJECTION

1. Claims 4, 6, and 61-62 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh (5,343,536) in view of Stoughton (3,969,516).

As to Claims 4 and 6, Groh discloses a process for acquiring scanned image data relating to an external body portion (skin) and/or a product applied to the external body portion, the process comprising:

placing a transfer member (11) in contact with an external portion (skin with adhesive) of an individual so as to obtain a transfer image (16) on the transfer member,

wherein the transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another,

wherein the transfer image is not a fingerprint or fingerprints, and

wherein the external portion that the transfer member is placed in contact with does not include a tooth or teeth; and

scanning the transfer image with an optical image scanner (col. 4, lines 47-49) to obtain scanned image data for an image representative of at least one characteristic of

the external body portion (cell and comedone presence, size, etc), and/or

at least one product applied to the external body portion,

wherein the transfer member is placed in contact with an external body portion that is capable of including a cosmetic product applied thereto, and wherein the image of the scanned image data is representative of at least one characteristic of the cosmetic product.

The system disclosed by Groh is used to detect comedones, which often appear on the face. (Figure 2, Column 3, Lines 64-67). Yet, Groh does not explicitly teach the application of the transfer member in contact with a cosmetic product applied to an external body portion.

Stoughton teaches the use of compositions to treat acne, where acne is a condition brought on by the inflammation of the skin (Column 1, Lines 10-50). Stoughton teaches the use

of multiple formulations wherein the formulation is applied to the skin of the patient, and later the comedones are removed, in order to test the efficacy of the drug formulations. (Column 3, Lines 1-55 and Column 2, Lines 20-33). As the formulation is applied to the skin, the formulation would be absorbed into the skin cells in order to treat the acne, by use of the testing device of Groh, the resulting testing of the comedones would extract the acne formulation being tested for efficacy.

Therefore, it would have been obvious to one having ordinary skill in the art at time the invention was made to apply a cosmetic product (like the acne treatment composition of Soughton) upon the skin, wherein the application of this product would result in the capturing of facial characteristics (comedones) including the cosmetic product worn by the patient, as the Appellant has done, for the purpose of testing the testing the efficacy of the acne treatment formulation.

Regarding claims 61-62, a “grade” (average number of comedones) that is indicative of at least one condition (accumulation of dirt in sebaceous glands) of the external portion is provided and stored in a database (col. 3, lines 1-32).

2. Claims 37, 46 and 47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh and Stoughton, and further in view of Kvedar (Kvedar, J.C. et al. (1999). *Teledermatology in a Capitated Delivery System Using Distributed Information Architecture: Design and Development. Telemedicine Journal*, 5(4), 357-366.).

As to Claim 37, the system of Groh as modified by Stoughton is discussed in claims 4 and 6. The difference between claim 37 and claims 4 and 6 is the use of a database for

comparing images. Groh discloses the image can be compared to at least one other image formed from image data stored in and retrievable from an image database (col. 3, lines 1-32). Yet the modified Groh does not explicitly teach the comparing of the displayed image. However, at the time the invention was made the use of comparing displayed images was known. Specifically, Kvedar teaches the comparison of images for the purpose of assessing the progress of the patient's treatment (Page 362, Column 2, Paragraph 1). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to compare images as taught by Kvedar to monitor the progression of the patient's treatment and determine appropriate care methods.

As to Claim 46, the system of Groh as modified by Stoughton is discussed in claims 4 and 6. The difference between claim 46 and claims 4 and 6 is the use of a database for comparing images. Groh discloses the image is displayed and viewed to analyze the characteristic of the external body portion. Regarding claim 59, the analysis is performed using an image analyzer. However, at the time the invention was made the use of comparing displayed images was known. Specifically, Kvedar teaches the comparison of images for the purpose of assessing the progress of the patient's treatment (Page 362, Column 2, Paragraph 1). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to compare images as taught by Kvedar to monitor the progression of the patient's treatment and determine appropriate care methods.

As to Claim 47, the system of Groh as modified by Stoughton and Kvedar teaches the transfer member is placed in contact with the external body portion. As addressed in claim 4, the system disclosed by Groh is used to detect comedones, which often appear on the face. (Figure 2,

Column 3, Lines 64-67). Any facial cosmetic worn by the patient (i.e., moisturizer, foundation makeup, etc) would be captured with the comedones when the transfer member is placed in contact with the external portion, and such cosmetic would be part of the scanned image data. Further, as the process of cleansing the skin (for example: utilizing water rather than soap) may result in residual cosmetics being scanned. Therefore, it would have been obvious to one having ordinary skill in the art at time the invention was made to modify the device of Groh to capture facial cosmetics worn by the patient, as the Appellant has done.

3. Claims 59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh, Stoughton, and Kvedar, and further in view of Murad (6,296,880).

As to Claim 59, the system of Groh/ Stoughton/Kvedar discloses all the recited elements with the exception of the analysis equipment. However, at the time the invention was made the use of the recited analysis equipment was known. Specifically Murad teaches the use of corneometer to detect the progress of treatment regimens for a patient suffering with acne. (Column 28, Lines 50). Therefore, it would have been obvious to one having ordinary skill in the art at time the invention was made to modify the system of Groh/Kvedar to include the use of a corneometer as taught by Murad, as a method of detecting the health of the skin in relationship to treatment methods.

4. Claim 48 is rejected under 35 U.S.C. 103(a) as being unpatentable over Groh and Stoughton in view of Sheng (6,801,343).

As to Claim 48, the system of Groh as modified by Stoughton is discussed in claims 4 and 6. The difference between claim 48 and claims 4 and 6 is the use of a database and a document scanner. Groh discloses information regarding the transfer image is collected to form a database (computer storage of binary filtered and normalized data, retrievable therefrom; col. 3, lines 1-32) for use in diagnosis or treatment recommendation determinations. Regarding the scanning of the image, Groh discloses, many image analysis hardware and software packages may be utilized to convert the transfer member image to a binary image (Column 4, Lines 60-62); yet the modified Groh does not expressly disclose the use of a document scanner to scan the image from the transfer member. However, at the time the invention was made the use of a document scanner to convert the transfer member image to a binary image was known. Specifically, Sheng discloses the use of a flat bed image scanner to scan a document or picture (13) to a digitized format for conveying the image to a computer. (Column 1, Lines 8-35). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize a flatbed image scanner as taught by Sheng, to enable the transfer of an image to a computer.

5. Claims 25-36 and 38-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh, Stoughton, and Kvedar, and further in view of Sheng (6,801,343).

As to Claims 25-36, and 38-45, please see the rejection of claims 4 and 6. Groh discloses the previously described process for acquiring scanned image data relating to an external body portion, the process comprising:

placing a transfer member (11) in contact with an external portion (skin with adhesive) of an individual so as to obtain a transfer image (16) on the transfer member,

wherein the transfer image is present on the transfer member after the transfer member and the external portion are out of contact with one another,

wherein the transfer image is not a fingerprint or fingerprints, and

wherein the external portion that the transfer member is placed in contact with does not include a tooth or teeth; and

scanning the transfer image with an optical image scanner (col. 4, lines 47-49) to obtain scanned image data for an image representative of at least one characteristic of

the external body portion (cell and comedone presence, size, etc), and/or

at least one product applied to the external body portion.

The image scanner is associated with a first computer (col. 2, last line).

The system disclosed by Groh is used to detect comedones, which often appear on the face. (Figure 2, Column 3, Lines 64-67). Yet, Groh does not explicitly teach the application of the transfer member in contact with a cosmetic product applied to an external body portion.

Stoughton which teaches the use of compositions to treat acne, where acne is a condition brought on by the inflammation of the skin (Column 1, Lines 10-50). Stoughton teaches the use of multiple formulations wherein the formulation is applied to the skin of the patient, and later the comedones are removed, in order to test the efficacy of the drug formulations. (Column 3, Lines 1-55 and Column 2, Lines 20-33). As the formulation is applied to the skin, the formulation would be absorbed into the skin cells in order to treat the acne, by use of the testing

device of Groh, the resulting testing of the comedones would extract the acne formulation being tested for efficacy.

Therefore, it would have been obvious to one having ordinary skill in the art at time the invention was made to apply a cosmetic product (like the acne treatment composition of Soughton) upon the skin, wherein the application of this product would result in the capturing of facial characteristics (comedones) including the cosmetic product worn by the patient, as the Appellant has done, for the purpose of testing the testing the efficacy of the acne treatment formulation.

Yet, the modified Groh does not specify transmitting the image to another computer/location for analysis.

Kvedar et al. disclose a process for acquiring scanned image data relating to an external body portion. Kvedar et al. disclose that an image of an external body portion is captured and image data for the image representative of the external body portion is uploaded onto a first computer. The process may further include transferring the scanned image data, via the Internet, to a second computer located at a location remote from the first location (p. 361, for example), so that other users (specialists) can view the images for consultation, to allow remote and repeatable analysis of a condition of the external portion. Kvedar et al. also disclose storing the scanned image data on a data storage medium (computer file), and wherein the transferring may include shipping (via email attachment) the data storage medium to the second location. Once the image data is transferred to the second location, the image is displayed at the second location and viewed to analyze the image characteristics. Kvedar et al. disclose that the scanned image data can be sent to a plurality of locations to be analyzed numerous times. Kvedar et al. disclose that

after the data is sent to a second location and analyzed, a recommendation for treatment can be provided (p. 362, col. 2; “(2)”), wherein the external portion is monitored during treatment (“Routine follow-up calls”) and information is provided regarding the effectiveness of the treatment (“assess their progress”). The recommendation is capable of being any recommendation determined by the specialist, including the use of a cosmetic or dermatologic product on the external portion (Kvedar et al. disclose this procedure to be used in treatment of *dermatologic* disorders, which are treatable with *dermatologic* products). The treatment recommendation is provided to the individual and/or treatment provider (p. 362; col. 2) via the Internet. Kvedar et al. disclose transferring questionnaire data (“history forms”) to the second location, wherein some of the data concerns the condition of the external product and any products applied thereto. The examiner takes Official Notice that in the process disclosed by Kvedar et al. it would have been obvious to send “at least one of billing information and payment information” to the second location, as is common business practice, in order for the consulting specialist to receive payment for their services. This is well within the performance of a normal business interaction, well known to one of ordinary skill in the art. The examiner also takes Official Notice that in the process disclosed by Kvedar et al. it would have been obvious to provide product-ordering information along with the treatment recommendation given by the specialist, as is common practice, in order for the patient to obtain the product to be used for treatment. This is well within the performance of a normal patient-client interaction, well known to one of ordinary skill in the art.

Regarding the scanning of the image, Groh discloses, many image analysis hardware and software packages may be utilized to convert the transfer member image to a binary image

(Column 4, Lines 60-62); yet Groh does not expressly disclose the use of a document scanner to scan the image from the transfer member. However, at the time the invention was made the use of a document scanner to convert the transfer member image to a binary image was known. Specifically, Sheng discloses the use of a flat bed image scanner to scan a document or picture (13) to a digitized format for conveying the image to a computer. (Column 1, Lines 8-35).

It would have been obvious to one skilled in the art at the time the invention was made to have provided the process for acquiring scanned image data, as disclosed by the modified Groh, wherein the image data is transferred to a second location and analyzed with the process taught by Kvedar et al., to allow remote and repeatable analysis of a condition of the external portion and the flat bed document scanner as taught by Sheng to enable the transfer of the image to a digitized computer format.

(10) Response to Argument

Although all rejections made in the final rejection have been withdrawn, as the new grounds of rejection simply amend the rejections with Groh as the base reference by adding the teachings of Stoughton, the examiner will address the appellant's arguments below.

Argument C

Appellant asserts the rejection of the claims 4, 6, and 61-62 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Number 5,343,536 to Groh is improper, citing the lack of a cosmetic product applied. However, Examiner respectfully disagrees. As addressed in the rejection of the claims, Groh teaches all of the recited steps except for the step

where “the transfer member is placed in direct contact with an external body portion including a cosmetic product applied thereto.” In order to address the deficiencies of Groh, Examiner asserted the application of cosmetics to the skin, would be a normal process that is well known in the art. Appellant argues that the presence of a cosmetic product would prevent or preclude the ability of the device of Groh perform its intended functionality, to detect comedones. However, Appellant has not provided evidence to this fact, nor does the prior art made of record explicitly discuss the manner by which the skin would be prepared in order to detect the comedones on the skin of the patient. In order to address these concerns, Examiner has cited as extrinsic evidence the Stoughton reference which teaches the use of compositions to treat acne, where acne is a condition brought on by the inflammation of the skin (Column 1, Lines 10-50). Stoughton teaches the use of multiple formulations wherein the formulation is applied to the skin of the patient, and later the comedones are removed, in order to test the efficacy of the drug formulations. (Column 3, Lines 1-55 and Column 2, Lines 20-33). As the formulation is applied to the skin, the formulation would be absorbed into the skin cells in order to treat the acne, by use of the testing device of Groh, the resulting testing of the comedones would extract the acne formulation being tested for efficacy. Thus in light of the aforementioned reasoning the rejection of the claims has been maintained.

Argument E

Appellant asserts the rejection of the claims 25-36 and 38-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh in view of Kvedar (Kvedar, J.C. et al. (1999). Tele dermatology in a Capitated Delivery System Using Distributed Information Architecture:

Design and Development. *Telemedicine Journal*, 5(4), 357-366.) and Sheng (6,801,343) is improper, citing the lack of a flatbed scanner to scan the image from the transfer member. However, Examiner respectfully disagrees. The rejection is based upon the combination of the prior art references where Groh teaches the use of a scanner, yet does not expressly disclose the storage of the image into a database as taught by Kvedar and the use of a document scanner as taught by Sheng. With respect to Sheng, Appellant has asserted the combination of the prior art references would not modify one scanner for another. However, there is no evidence to the contrary presented by the Appellant that would prevent or preclude the ability of one or another scanner device to be used. Rather the question would be the quality of the image procured by the different scanners. However, as the quality of the image is not in question rather the ability of the image to be detected, Examiner finds this argument to be unfounded. Appellant is reminded, although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Thus in light of the aforementioned reasoning the rejection of the claims has been maintained.

Argument F

Appellant asserts the rejection of the claims 37, 46 and 47 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh in view of Kvedar (Kvedar, J.C. et al. (1999). *Telemedicine Journal*, 5(4), 357-366). is improper, citing the lack of a process for evaluating the product. However, Examiner respectfully disagrees. As addressed in

Art Unit: 3771

the rejection, the combination of the prior art references is based upon the teaching of monitoring the progress of a patient's treatment therapy in order to determine appropriate care steps. Kvedar teaches the use of database by which the images are compared in order to assess the efficacy of treatment. The step of comparing is in fact a evaluation process by which the effectiveness of the product is determined. Yet the claims do not recite the analysis to be based upon the composition of the product. Appellant is reminded, although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Thus in light of the aforementioned reasoning the rejection of the claims has been maintained.

Argument G

Appellant asserts the rejection of the claim 48 is rejected under 35 U.S.C. 103(a) as being unpatentable over Groh in view of Sheng (6,801,343) is improper, citing the lack of a flatbed scanner to scan the image from the transfer member. Please see Examiners remarks with respect to Sheng in light of Argument E.

Argument H

Appellant asserts the rejection of the claim 59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Groh in view of Kvedar (Kvedar, J.C. et al. (1999). *Teledermatology in a Capitated Delivery System Using Distributed Information Architecture: Design and Development. Telemedicine Journal*, 5(4), 357-366.) and Murad (6,296,880) is improper, citing one of ordinary skill in the art would not use a conrneometer. However, the fact that appellant

has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985). In this case, Murad teaches the use of a corneometer is to monitor the health of the skin wherein the health of the skin would provide an analysis to efficacy of the treatment of the patient's condition. Thus, in light of the aforementioned reasoning the rejection of the claims has been maintained.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

This examiner's answer contains a new ground of rejection set forth in section **(9)** above. Accordingly, appellant must within **TWO MONTHS** from the date of this answer exercise one of the following two options to avoid *sua sponte* **dismissal of the appeal** as to the claims subject to the new ground of rejection:

(1) Reopen prosecution. Request that prosecution be reopened before the primary examiner by filing a reply under 37 CFR 1.111 with or without amendment, affidavit or other evidence. Any amendment, affidavit or other evidence must be relevant to the new grounds of rejection. A request that complies with 37 CFR 41.39(b)(1) will be entered and considered. Any request that prosecution be reopened will be treated as a request to withdraw the appeal.

(2) **Maintain appeal.** Request that the appeal be maintained by filing a reply brief as set forth in 37 CFR 41.41. Such a reply brief must address each new ground of rejection as set forth in 37 CFR 41.37(c)(1)(vii) and should be in compliance with the other requirements of 37 CFR 41.37(c). If a reply brief filed pursuant to 37 CFR 41.39(b)(2) is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under 37 CFR 41.39(b)(1).

Extensions of time under 37 CFR 1.136(a) are not applicable to the TWO MONTH time period set forth above. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for ex parte reexamination proceedings.

Respectfully submitted,

/Annette F Dixon/

Examiner, Art Unit 3771

A Technology Center Director or designee must personally approve the new ground(s) of rejection set forth in section (9) above by signing below:

/DONALD T HAJEC/

Director, Technology Center 3700

Conferees:

Art Unit: 3771

/Justine R Yu/

Supervisory Patent Examiner, Art Unit 3771

/Janet C. Baxter/
TC 3700 TQAS